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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIRLINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD and RESORT AIRLINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of United States Court of Appeals for the District of Columbia (R. 71-72) and the opinions and orders of the Civil Aeronautics Board (R. 22-35, 36-43) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1950 (R. 71). The petition for a writ of certiorari was filed on August 4, 1950. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Application was made to the Civil Aeronautics Board by two carriers for certificates of convenience and necessity to conduct overseas air tours. Pursuant to Section 801 of the Civil Aeronautics Act, the Civil Aeronautics Board submitted to the President a decision denying both applications. The President directed that one of the applicants be granted a certificate and the Board adopted an order complying with this directive, which the President approved. The questions presented are:

1. Whether petitioner is barred from attacking the President's action as exceeding statutory authority or as being unconstitutional because petitioner failed to raise these issues before the Civil Aeronautics Board.

2. Whether the action taken in this case failed to comply with the Civil Aeronautics Act by reason of the fact that the President designated the carrier to be certificated or by reason of the fact that the Board did not make a finding as to the fitness of the carrier certificated.

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3. Whether, under the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, the President's decision in this case is judicially reviewable.

4. Whether the statute as here applied is constitutional.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, are set forth in the Appendix, *infra*, pp. 15-16.

STATEMENT

Resort Airlines, Inc. and American Air Export and Import Company filed applications before the Civil Aeronautics Board pursuant to Section 401 of the Civil Aeronautics Act for authority to engage in aerial all-expense tours and the applications were heard upon a common record. Petitioner and thirteen other certificated air carriers were granted leave to intervene in this proceeding and actively participated therein. After hearings before an Examiner, he issued a report recommending that the Board grant to Resort certain certificates of public convenience and necessity (R. 11). In such report the Examiner found that Resort is "fit, willing, and able properly to perform the air transportation service recommended" (R. 12). Subsequently the Board adopted but did not publish an opinion and proposed order finding that public convenience and necessity did not re-

quire the air transportation proposed, and that both applications should be denied (R. 22-34). In view of this proposed disposition of the applications it was unnecessary for the Board to pass upon the fitness and ability of the respective applicants, and no findings thereon were made.

Pursuant to the provisions of Section 801 of the Act (*infra*, pp. 15-16), the Board submitted its opinion containing its findings, conclusions and decision to the President for approval (R. 42). The President subsequently advised the Board that for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas transportation substantially in accord with the recommendation of the Examiner (R. 41). Pursuant to this Presidential directive, the Board on June 1, 1949, adopted an opinion, subsequently approved by the President on June 9, 1949, setting forth the President's action, and issued an order granting a temporary certificate of public convenience and necessity to Resort authorizing the tours (R. 36, 42, 43). The certificate provided that it was to become effective within 60 days after the date of its approval by the President unless prior thereto the Board extended such effective date on its own initiative or upon the filing of a petition for reconsideration of its order (R. 45). Petitioner did not file a petition for re-

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consideration although such petitions were filed by several other party intervenors. The Board denied these petitions on August 4, 1949, and the certificate issued to Resort became effective on August 8, 1949, sixty days after the President's approval thereof (R. 59-61).

Petitioner on August 8, 1949, filed a petition for review based upon Section 1006 of the Act (49 U. S. C. 646) seeking review of the Board's order of June 1, 1949 (R. 45). Respondent moved to dismiss the petition for review upon the ground that the Board's order is not subject to judicial review on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, or in the alternative to dismiss the petition for want of jurisdiction as to four of the grounds upon which it attacked the order and to affirm the order forthwith as to the other two grounds of attack for the reason that they were clearly without merit (R. 61-63). The court of appeals entered a *per curiam* order dismissing the petition (R. 65-66). On petitioner's motion for reconsideration or for clarification (R. 66), the court entered a clarifying *per curiam* order dismissing the petition on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (R. 71-72).

ARGUMENT

I

The sole grounds upon which petitioner challenges the validity of the grant of a certificate to Resort are that (1) there was failure to comply with the requirements of the statute in granting such certificate and (2) that Section 801 of the Act constitutes an unconstitutional delegation of congressional power to the President. But petitioner did not raise these issues before the Board although it had opportunity to do so, and they are therefore not open to judicial review. The proceeding for review of the Board's order was brought under Section 1006 of the Act and subdivision (e) of Section 1006 provides (*infra*, p. 16):

> No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

There were not "reasonable grounds" for petitioner's failure to urge its objections before the Board. Not only did the Board's order granting a certificate to Resort (to become effective more than 60 days thereafter) authorize the filing of petitions for reconsideration and not only were such petitions filed by other intervenors (*supra*, p. 5), but the Board's Rules of Practice (14 C. F. R. sec. 285.11) expressly provide that any party may petition for reconsideration of any final order of

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the Board. In the past the Board has, upon reconsideration, reversed with the approval of the President an order which it had previously entered after the order had been approved by the President under Section 801. *Pacific Northwest-Hawaii Service Case,* 9 C. A. B. 414, approved July 29, 1948, Order Serial No. E-2048, approved October 2, 1948.

If petitioner had urged its objections before the Board, that body would have been afforded opportunity to take any appropriate corrective action had it deemed petitioner's contentions meritorious. The purpose of Section 1006(e) is, of course, to afford the administrative agency an "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256. Accordingly, the court of appeals lacked jurisdiction to entertain the only objections to the Board's order which the petitioner relies upon in its petition for a writ of certiorari.[1] See *American Power & Light Company* v. *Securities & Exchange Commission,* 141 F. 2d 606 (C. A. 1), affirmed, 329 U. S. 90. Nor will constitutional questions be considered when they might have been, but were not, raised in the course of orderly administrative process. *Aircraft & Diesel Equipment Corporation* v. *Hirsch,* 331 U. S. 752.

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[1] Petition for writ of certiorari, p. 1.

II

If, contrary to our argument under Point I, petitioner is in a position to urge non-compliance with statutory requirements in the certification of Resort notwithstanding its failure to present this claim to the Board, its application for certiorari must nevertheless be denied because of the lack of merit in this contention. The case, therefore, does not present the question stressed by petitioner as to whether an order not satisfying statutory requirements is reviewable.

Petitioner does not challenge the steps in the administrative proceeding leading up to the decision which the Board originally submitted to the President. Its contention is that although the order of the Board which it is attacking derives vitality only from approval by the President, the statute requires (1) that the Board, and not the President, must designate the carrier to be given a certificate and (2) that the Board must make a finding of the "fitness" of the certificated carrier to perform the transportation service authorized by the certificate issued to it.

The first contention seems wholly without substance. The Board in its order of June 1, 1949, did designate Resort as the carrier to receive a certificate to perform certain foreign air transportation. It is true that the Board so acted at the direction of the President, but this is precisely what is contemplated and authorized by Section

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801 of the Act. As this Court said in the *Waterman* case (p. 109), the President's control of the ultimate decision is not "a mere right of veto," his control "is not limited to a negative but is a positive and detailed control over the Board's decisions." In other words, Section 801 authorizes the President to determine that a particular applicant for a certificate is entitled to receive a certificate of authority to operate.

It is also apparent that the finality of the President's determination that a carrier should receive a certificate authorizing it to engage in certain air transportation is not qualified by the condition that the Board make a finding that the carrier is "fit, willing and able" to perform such transportation. If the power conferred upon the President by Section 801 were thus conditioned, the Board would have the authority to frustrate the President's determination. The absurdity of this result is underlined by the fact that the President may have acted upon independent information not available to the Board or to the public. He may act upon "information properly held secret" (333 U. S. at p. 111). Grant of authority to conduct foreign air transportation involves issues which "should be prudently correlated with facilities and plans for our own national defenses and raise[s] new problems in conduct of foreign relations" (*id.* 108).

Here the President's decision was based on reasons affecting our relations with foreign countries

and in the interest of our national security (R. 41). Since Congress intended to vest in the President power to make decisions based upon broad national interests, it would be wholly inconsistent with this objective to construe the statute as subjecting his power to the qualification that the Board find that the carrier whom the President has found to be fit to perform certain transportation is, in fact, "fit, willing and able." Particularly is there no room for such a limitation when the information available to the Board may be narrower than that on which the President has acted.

III

We have shown under Point II that in the present case there was no departure from statutory requirements. It therefore follows that the *Waterman* case is controlling. That case held that when the President has acted pursuant to the authority given him by Section 801 of the Act and has approved an order of the Board issued at his direction, such order "emanates from the President [and] is not susceptible of review by the Judicial Department" (333 U. S. at p. 112). In the *Waterman* case the President had disapproved certain portions of the decision which the Board had submitted to him and had advised the Board of the changes which he required, and the Board then submitted a revised order and opinion which the President approved. *A fortiori* in the present case, where the entire order adopted by the Board

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and approved by the President emanated from him, the order is not subject to judicial review.

Clearly the court of appeals was right in dismissing the petition for review because "after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion." 333 U. S. at p. 113. In the present case the order of the Board was "finalized by Presidential approval" when the President approved the order on June 9, 1949. Orders so finalized "embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." *Id.*, p. 114.

IV

Petitioner contends (Pet. 13) that Section 801 constitutes an unconstitutional delegation of congressional power. We submit that since petitioner did not urge this objection before the Board it is not in a position to make this contention. See *supra,* pp. 6-7. Furthermore, it is questionable whether the contention is presented to this Court by the petition for writ of certiorari. The petition (p. 1) prays for review of the order which the court of appeals entered in this case "in so far as said order dismissed the petition for review and denied judicial review of the contentions advanced by petitioner in Points 4 and 5 of its petition for

review." Points 4 and 5 of said petition (R. 52-53) do not charge that Section 801 constitutes an unconstitutional delegation of congressional power.[2]

In any event, there is no merit to the contention that Section 801 is subject to constitutional infirmity because of absence of statutory standard to serve as a guide to exercise of the authority conferred upon the President by that section. The constitutionality of Section 801 was implicitly sustained in the *Waterman* case (333 U. S. at p. 109). See also *Colonial Airlines, Inc.* v. *Adams,* 87 F. Supp. 242 (D. D. C.), appeal dismissed on motion of appellant, 338 U. S. 947.

Whether or not the standards of "public interest" (see Sections 2, 401(d) of the Act) are applicable to action taken under Section 801, the delegation is clearly valid. As the *Waterman* case declares, the President possesses in the field of foreign air transportation both his own constitutional authority "as Commander-in-Chief and as the Nation's organ for foreign affairs" and the power delegated to him by Congress, and the President's

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[2] The petition for review did not set forth this constitutional question as a ground for reversal of the Board's order (R. 51-53). While petitioner applied to the court below for leave to amend its petition for review so as to set forth this constitutional question as ground for reversal, the court below denied the petition for leave to amend (R. 71-72). Moreover, the petition for leave to amend is not included in the record filed with this Court.

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action under Section 801 "draws vitality from either or both sources." 333 U. S. at pp. 110-111. Where Presidential authority thus arises from a pooling of executive and legislative powers, it is well established that Congress need not set forth standards to guide the action of the Executive. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537. See also *Lichter* v. *United States*, 334 U. S. 742, 785; *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U. S. 90, 104-105. Indeed, Congress failed to prescribe standards limiting the President's discretion because it believed any such restriction would infringe upon the Executive's constitutional prerogatives.[3] To read into the statute a congressional restriction on the power of the President in this critical field might even raise constitutional doubts as to its validity.

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[3] Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong. 3d Sess. (1938) on H. R. 9738, pp. 37, 40; Hearings before the Senate Committee on Commerce, 75th Cong., 3rd Sess. 1938, on S. 3760, p. 6; 83 Cong. Rec. 6726; 83 Cong. Rec. 6853.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below is correct and that the petition for a writ of certiorari should be denied.

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August, 1950.

APPENDIX

Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481) provides in part:

> (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation: * * *.
>
> * * * * *
>
> (d)(1) The [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601) provides in part:

> The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all appli-

cations in respect of such certificates and permits shall be transmitted to the President by the [Board] before hearing thereon, and all decisions thereon by the [Board] shall be submitted to the President before publication thereof. * * *

Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646) provides in part:

(a) Any order, affirmative or negative, issued by the [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(e) The findings of facts by the [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

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